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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Amendment of Part 90 Concerning the)
Commission's Finder's Preference Rules)

WT Docket No. 96-199

TO: The Commission

DOCKET FILE COPY ORIGINAL

COMMENTS OF NEXTEL COMMUNICATIONS, INC.

NEXTEL COMMUNICATIONS, INC.

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Dated: November 18, 1996

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COMMENTS OF NEXTEL COMMUNICATIONS, INC.

I. INTRODUCTION

Pursuant to Section 1.415 of the Rules of the Federal Communications Commission ("Commission"), Nextel Communications, Inc. ("Nextel") respectfully submits these Comments on the Commission's Notice Of Proposed Rule Making ("NPRM") in the above-captioned proceeding.^{1/}

In the NPRM, the Commission proposes to eliminate the finder's preference program in the 220-222 MHz Specialized Mobile Radio ("SMR") service for the same reasons that it has already eliminated the program in the 800 MHz and 900 MHz SMR services.^{2/} The Commission also seeks comment on whether to continue the finder's preference program for private land mobile radio ("PLMR") services in the 470-512 MHz, 800 MHz and 900 MHz bands.^{3/} Finally, the Commission proposes to "retain the discretion to dismiss pending finder's preference requests" for those services in which it

^{1/} Notice Of Proposed Rule Making, FCC 96-383, released September 27, 1996.

^{2/} NPRM at para. 9.

^{3/} *Id.* at para. 1.

decides to eliminate the finder's preference program, e.g., 800 and 900 MHz SMRs.

Nextel fully supports the Commission's proposals. The finder's preference program is at odds with the Commission's proposed geographic licensing for 220-222 MHz SMR services, as well as 800 and 900 MHz SMR services, and the continued consideration of finder's preference applications (including pending requests) would frustrate the goals of geographic area licensing. To ensure that geographic area licensees are granted exclusive rights to all of the channels covered by their licenses, the Commission must (1) eliminate the finder's preference program in all services being transitioned to geographic area licensing; and (2) immediately dismiss all pending finder's preference requests in those services.

II. DISCUSSION

A. The finder's preference program frustrates the purposes of geographic area licensing and should be immediately eliminated in those services transitioning to geographic area licensing

When the Commission created the finder's preference program, it believed that it could not -- by itself -- adequately monitor the construction and operation of all land mobile radio stations licensed throughout the country. This is no longer the case, as the Commission itself recognized in the NPRM.^{4/} Moreover, the Commission correctly concluded in both the 800 MHz and 900 MHz SMR proceedings that the continuation of its finder's preference program is at odds with the implementation of geographic area

^{4/} *Id.* at para. 10 ("enforcement of our rules with regard to these PLMR channels can be adequately addressed with ongoing oversight programs and compliance review programs.").

licensing and should therefore be eliminated.^{5/} Elimination of the program, the Commission concluded, was necessitated by the fact that the geographic area licensee (who will have participated in an auction and paid for the license) is entitled to exclusive rights to all of the channels covered by that license -- including those which become available due to an incumbent's deconstruction, discontinuation of service, or failure to meet outstanding construction and operational requirements.^{6/}

This is particularly true in the 800 MHz SMR service where many existing licensees hold extended implementation authorizations permitting construction up to five years from the grant date. Even under the Commission's extended implementation rejustification initiative,^{7/} many incumbent 800 MHz SMR licensees will likely have construction deadlines beyond the planned auction of the upper 200 800 MHz SMR channels. If the winning bidder at the auction is not assured of an automatic right to those channels that remain unbuilt after their construction deadlines, e.g., those channels that are not properly constructed pursuant to extended implementation authorizations, the whole point of geographic area

^{5/} See Second Order on Reconsideration and Seventh Report and Order, 11 FCC Rcd 2639 (1995) ("900 MHz SMR Order") and First Report and Order, Eighth Report and Order, and Second Further Notice of Proposed Rule Making, 11 FCC Rcd 1463 (1995) ("800 MHz SMR Order").

^{6/} See 900 MHz SMR Order at para. 57; 800 MHz SMR Order at para. 59.

^{7/} 800 MHz SMR Order at para. 111, requiring all 800 MHz SMR licensees holding extended implementation authority to rejustify that such authority is warranted and furthers the public interest.

licensing would be compromised. Continuation of the finder's preference program would undercut those rights.

Moreover, as the Commission correctly pointed out in the NPRM, the geographic area licensee must be able to provide uniform service throughout its service territory. Competing with finder's preference applicants for channels already assigned to it pursuant to the geographic area license would undercut rapid deployment of such uniform services, and would create another regulatory burden for SMR providers -- whether 800 MHz, 900 MHz or 220 MHz -- that has not been imposed upon their Commercial Mobile Radio Services ("CMRS") competitors.

In the context of competitive bidding for geographic area licenses, moreover, the Commission no longer needs a finder's preference program to ensure compliance with its spectrum use and efficiency rules. First established in an era of site-by-site licensing, the finder's preference program assisted the Commission in identifying licensees who had failed to meet the Commission's rules concerning timely construction and operation of stations. However, geographic area licensees have construction deadlines that must be fulfilled in order to retain the licenses -- a more efficient, self-executing mechanism for monitoring a licensee's progress in meeting its regulatory obligations. Moreover, as the Commission recently stated in its Notice Of Proposed Rule Making for reallocation and licensing of the 2305-2320 and 2345-2360 MHz bands, the economic incentives created through competitive bidding encourage licensees to build out their systems, thereby ensuring

the fulfillment of construction and operational requirements.^{8/} These safeguards are adequate to ensure that licensees are complying with the Commission's rules and employing their spectrum in an effective and efficient manner.

Given the tendency of parties to abuse the use of the finder's preference program, as well as its limited use in the PLMR context,^{9/} the Commission should likewise eliminate it for PLMR services that will continue to be licensed on a site-by-site basis. As the Commission has stated, its resources should be sufficient to provide the necessary oversight and monitoring of these licenses.

B. Continuing to process pending finder's preference requests is not in the public interest

The Commission correctly concludes that it has authority to retain the discretion to dismiss pending finder's preference requests in any and all services in which it decides to eliminate the program.^{10/} The Commission should dismiss all pending requests. Wide-area licensees who purchase their licenses at an auction should not be required to "give up" channels to which they have purchased exclusive rights.

Many pending finder's preference requests, moreover, have become stale while awaiting Commission action. Most of these requests are supported by little or inconclusive evidence which is

^{8/} Notice Of Proposed Rule Making, FCC 96-441, released November 12, 1996, at para. 60 ("Auctioning itself provides economic incentives for licensees to utilize spectrum efficiently and to provide service rapidly.").

^{9/} NPRM at para. 8.

^{10/} *Id.* at para. 11.

requests are supported by little or inconclusive evidence which is used to bootstrap minor construction or build-out anomalies, while ignoring the fact that the station has been constructed, operating and providing service to customers for years. Many of these finder's preference applications, moreover, are based on construction errors that have only been discovered through the use of new, more sophisticated measuring techniques -- techniques that were not available to licensees at the time they constructed the station.

Examples of misuse of the Commission's finder's preference program include a finder's preference application alleging failure to construct a station in Sherman Oaks, California which was fully operational but constructed 3100 feet from its licensed coordinates.^{11/} In another example, a finder's preference application was filed on a station in Beachwood, NJ despite the fact that it had been timely constructed and operating for nearly four years.^{12/} In Louisiana, several finder's preference applications have been filed against a number of fully operational stations, all of them providing service to the public.^{13/} Rather than continuing to waste Commission resources to investigate

^{11/} In the Matter of Lawrence E. Vaughn, Jr., Order No. DA 94-903.

^{12/} In the Matter of Edwin N. Fowlkes, Compliance File No. 94F233, filed August 15, 1994.

^{13/} See, e.g., Request of Laura Lee Fairbanks, Compliance File No. 94F219 (station located less than one mile from its authorized coordinates); and Request of Patrick Connelly, Compliance File No. 94F152 (station constructed 200 feet from its authorized coordinates).

requests that have been filed against legitimate, operating entities, the Commission should waste no more of its time and simply dismiss the applications.

Dismissing pending finder's preference requests is not unfair to these applicants. There are free, if they seriously desire to provide service, to compete in an auction with all other potential licensees or, if authorized by the Commission, through disaggregation and/or partitioning of the geographic area licenses. The public interest is not served by the Commission spending its time and resources on old, outdated and unjustified claims; on the contrary, the public interest would be served by investing these resources furthering a more competitive CMRS industry.

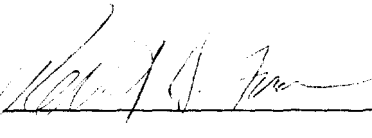
III. CONCLUSION

The use of competitive bidding, combined with the rigorous construction and build-out requirements imposed on geographic area licensees, will provide the necessary monitoring and compliance review the Commission needs to protect the public interest in ensuring the spectrum is put to effective and efficient use. To enable the creation of a more competitive CMRS industry and provide the public with new, enhanced wireless services, the Commission should eliminate the finder's preference program in its entirety

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for all services and immediately dismiss all pending finder's preference requests.

Respectfully submitted,
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By 

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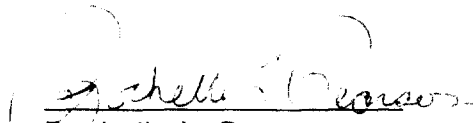
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Dated: November 18, 1996

CERTIFICATE OF SERVICE

I, Rochelle L. Pearson, hereby certify that on this 18th day of November 1996, I caused a copy of the attached Comments of Nextel Communications, Inc. to be served by hand delivery to the following:

Jackie Chorney
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Rochelle L. Pearson